UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOWARD INDUSTRIES, INC.,)		ar.
TRANSFORMER DIVISION,)		
)		
and)	Case Nos.	15-CA-18637
)		15-CA-18772
INTERNATIONAL BROTHERHOOD)	4.4	
OF ELECTRICAL WORKERS,)		
LOCAL UNION 1317.)		

RESPONDENT'S MEMORANDUM IN SUPPORT OF MOTION TO STRIKE GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

NOW COMES the Respondent, Howard Industries, Inc., Transformer Division, through the undersigned, who file this Memorandum in Support of its Motion to Strike General Counsel's Exceptions to the Decision of the Administrative Law Judge.

I. PROCEDURAL HISTORY

On December 22, 2008, the General Counsel, through the Acting Regional Director of Region 15, issued the Consolidated Complaint in this matter. The Consolidated Complaint alleged that Respondent, Howard Industries, Inc., Transformer Division, violated the Act by threatening James Chancellor, a steward and employee, with discipline while he was representing another employee.¹

On January 2, 2009, Respondent filed its Answer.

On July 6, 2009, a hearing on the matter was held before Administrative Law Judge George Carson, III, in Laurel, Mississippi. After hearing the evidence, the ALJ issued a bench decision found at pages 128 through 133 of the transcript.²

On July 28, 2009, the ALJ issued his formal Decision transferring the case to the Board.³

The Consolidated Complaint contained another ULP allegation that is not relevant to these Exceptions. Cites to the transcript will be noted as "Tr. {page no.}."

II. THE RELEVANT ULP ALLEGATION

The ULP allegation at issue in these Exceptions is Paragraph 7 of the Consolidated Complaint, which alleges:

On or about April 7, 2008, Respondent, by Brent [sic] Stringer, at Respondent's facility, threatened employees [James Chancellor] with discipline for using notes while representing other employees [Dasmeon Caraway] during investigatory interviews.

III. RELEVANT FACTS

On April 7, 2008, Union Vice President and senior steward James Chancellor met with an employee named Dasmeon Caraway in preparation for an investigatory interview with Human Resources Generalist Brant Stringer. Chancellor's participation had been specifically requested by Caraway when he was told of the interview. Tr. 23. Chancellor and Caraway conferred for 20-25 minutes during which they presumably discussed matters related to conduct that might result in Caraway's discipline. Tr. 24. During this conference, Caraway apparently told Chancellor that he had not been properly trained. Tr. 27.

Following this conversation, Chancellor, Caraway and Stringer met in Stringer's office. Also present was a supervisor named Rufus McGill. Stringer asked Caraway a number of questions which he answered on his own. Late in the meeting, Chancellor tapped a notebook that he was holding and appeared to direct Caraway's attention to something that was written in the notebook. Tr. 25, 46, 80.

Here there is conflicting testimony. Caraway and Stringer testified that Caraway read whatever was written in Chancellor's notebook. Tr. 46, 80. Chancellor testified that Caraway asked permission to ask a question and then asked Stringer how he could receive a warning letter for a job that he was never trained on. Tr. 28.

Cites to the ALJ's Decision will be noted as "Dec. p. #, 1. #."

Stringer then asked Chancellor to allow Caraway the opportunity to tell him in his own words what had occurred, asking him to lower the notebook. Chancellor and Caraway testified that Stringer then told Chancellor to remove the notebook or he would be suspended. Tr. 28, 46. Stringer testified that after Chancellor refused to lower the notebook, he told him to remove it from the room. Tr. 80-81. Stringer denied making any threats of disciplinary action. Tr. 83, 88, 93. Chancellor removed the notebook, and the interview continued for a few more minutes. Tr. 29, 81.

Several minutes after the investigatory meeting ended, Stringer met with Chancellor, told him that he did not mind him having a notebook, but that he did not want employees to use it as a script. Tr. 34, 39, 82. Chancellor has had other investigatory meetings with Stringer both before and after April 7, 2008, and has never been prohibited from using his notebook. Tr. 39, 82-83. Chancellor could not recall any other occasion when he tapped on his notebook and showed it to a witness, although he testified that he was sure that he must have done so. Tr. 36.

ARGUMENT

A. The Administrative Law Judge correctly found that the union steward's representational responsibilities were not interfered with when he was prohibited from continuing to show a scripted response to an employee during the course of an investigatory interview.

General Counsel's argument rests on the proposition that the Administrative Law Judge ("ALJ") erred by finding that even if Stringer had threatened Caraway with disciplinary action it was related to Chancellor's providing a script to Caraway, not to his taking or using notes. Dec. p. 2, 1. 40-42. The underlying premise of this argument is that Caraway was not reading from a script. GC Memo. p. 6. GC Exh.-2 was entered into evidence and described as the page out of Chancellor's notebook that he directed to Caraway's attention. Tr. 27. That document reads as follows:

I never was actually trained to do that job. I only filled in when they needed me. I am actually a pay rate 17 painter.

General Counsel contends that this is not a script, but rather a "generally worded statement" that was Caraway's "own account" of the matter. GC Memo. p. 6. Significantly, neither Messrs. Caraway nor Chancellor testified that this was Caraway's "own account" of the matter. Caraway did not testify that he even mentioned a lack of training to Chancellor during their preliminary meeting, and all Chancellor testified about on this issue was that Caraway told him that "he had not been properly trained." Tr. 27.

When Caraway's testimony on this matter is compared to the articulate statement contained in GC Exh. 2, it is obvious that this was not Caraway's "own account" of the matter. In fact, in all due respect to Mr. Caraway, Charging Party's own attorney stated that Mr. Caraway was not as "articulate as I would have liked him to be." Tr. 123. The simple fact is that this was a script prepared by Chancellor and read by Caraway.

General Counsel also contends that since Mr. Caraway wanted to make the point that he had not been properly trained it was permissible for him to read from a script written by someone else. GC Memo. p. 6. General Counsel apparently believes that because the Supreme Court did not use the term "own words" in the <u>Weingarten</u> decision, that this type of liberty is permissible. GC Memo. n. 5.

Based on the General Counsel's interpretation of <u>Weingarten</u>, Chancellor could have personally presented Caraway's case for him as long as it was consistent with Caraway's "account" of the matter. Obviously, that was not the holding in <u>Weingarten</u> or any of its progeny. <u>Weingarten</u> holds that an employer may insist that an employee give his own explanation of events. That does not include reading from a script that was prepared by someone else.

General Counsel places great emphasis on the fact that Caraway was offering "extra information" rather than responding to a question. Respondent is at a loss to understand how this nuance authorizes an employee to read from someone else's prepared script. Again, Weingarten and its progeny all stand for the right of an employer to hear an employee's own explanation, which may be offered with or without having been asked a question.

General Counsel also argues that when Stringer told Chancellor to close and then remove his notebook, that "it quite reasonably appeared to Chancellor, as it should to the Board," that Caraway was being deprived of Chancellor's assistance. The General Counsel based this assertion on his assumption that Stringer did not tell Chancellor that he would have the opportunity to speak later in the meeting. GC Memo. p. 9.

There is no evidence in the record to support this assertion. Neither Chancellor nor Stringer was questioned about it. All we know from the record is that the meeting continued for a few more minutes, that Chancellor had always been allowed to bring his notebook to investigatory meetings, and that Stringer's only concern was that the employee not read from a script. Tr. 39, 80-83.

Mr. Chancellor was a union vice president and the senior steward in a bargaining unit with over 2,200 members. He has been a union steward for 14 years and has handled somewhere between 20 and 49 investigatory interviews. Tr. 22, 30. Mr. Chancellor was not asked to remain silent during the questioning, nor did he apparently do so. Stringer had no obligation, nor would it have made sense for him to tell Chancellor that he could ask questions at the end of the interview. Mr. Chancellor was well aware of his role as a union steward, and apparently was not shy about carrying out his obligations as a steward.

General Counsel's assertion that Respondent had no basis on which to assert that Chancellor wrongfully interfered with its investigation is simply wrong. GC Memo. p. 9. According to all three witnesses, the interview was progressing in a normal fashion until Chancellor showed the scripted page to Caraway. Mr. Stringer testified that Caraway appeared to be reading from the script, and Mr. Caraway testified that this is exactly what he was doing. Tr. 46, 80, 87, 96. In fact, Mr. Caraway's precise testimony was "And then Mr. James opened the notebook, and I started reading off of it." Tr. 46.

Reading from a script prepared by someone else certainly can interfere with an investigation. Furthermore, Stringer had no way of knowing how much more of Caraway's responses were scripted because he could not see the contents of Chancellor's notebook. For all Stringer knew, there could have been many more pages of scripted dialogue. In fact, for all we know, there could have been many more pages of scripted dialogue since General Counsel did not enter the notebook into the record.

The ALJ correctly concluded that Caraway was improperly reading from a script prepared by someone else, and that Stringer was within his rights to demand that Chancellor stop showing the script to Caraway. This occurred near the end of the interview, after Mr. Caraway had responded to most of Stringer's questions. After this he answered a few more questions and was free to add whatever else he or Chancellor felt he needed to add. Mr. Chancellor's representation of Caraway was not restricted in any way other than by prohibiting him from continuing to show Caraway a scripted response.

For these reasons, Exception No. 3 should be stricken.

Exception Nos. 1 and 2 Should Also Be Stricken

Exception Nos. 1 and 2 are based on General Counsel's assertion that Chancellor was threatened with discipline "for using notes while representing other employees." The ALJ concluded that even if a threat had been made, it would have related to providing a script to an employee, not to the steward taking or using notes. Dec. p. 2, 1. 37-42. For the reasons discussed above, that was clearly the case, and the ALJ's findings should be affirmed.

General Counsel's substitution of his own judgment for that of the ALJ on the issue of whether Stringer threatened to discipline Chancellor is also defective. Stringer testified that he did not threaten Chancellor, Chancellor testified that he did, and Caraway supported Chancellor's testimony. General Counsel apparently treats testimony like a ball game and contends that he wins 2 to 1.

It is the role of the ALJ, not the General Counsel, to make credibility resolutions. Moreover, General Counsel's conclusions defy logic. After positing that Chancellor and Stringer would both commit perjury because both had "self-serving reasons to lie," General Counsel concludes that no such motivation exists in Caraway, despite the fact that he was fired by Stringer. GC Memo. p. 10. General Counsel then goes on to argue that Caraway was truthful because his testimony that the alleged threat was made after Chancellor questioned the instruction to close the notebook conflicted with Chancellor's testimony that the threat was made immediately following the instruction, before Chancellor could even respond. Id. So, according to the General Counsel, the inconsistent testimony of his only two witnesses proves that they are both telling the truth!

It is not the role of the General Counsel or Respondent to make credibility resolutions. The ALJ correctly concluded that it was not necessary for him to make such a resolution in this case, and therefore Exception Nos. 1 and 2 should also be stricken.

CONCLUSION

The ALJ's decision should be affirmed. He correctly found that Chancellor prepared a script which was read by Caraway, and that this behavior falls outside of the protections of Weingarten. Based on that, he concluded that Stringer was within his rights to require Chancellor to discontinue this activity, and that it was therefore unnecessary to rule on whether Stringer also threatened Chancellor with discipline. The ALJ correctly held that Respondent did not violate the Act.

Respectfully submitted this 1st of September, 2009.

/s/ Elmer E. White III
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CERTIFICATE OF SERVICE

I hereby certify that I have on this 1st day of September, 2009, caused a copy of the above and foregoing pleading to be served via E-Mail, upon the following:

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/s/ Elmer E. White III
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